Supreme Court, U.S.
FILED

97 1437 MAR 3 1998

OFFICE OF THE CLERK

No. _____

***

QUESTIONS PRESENTED

I.

Whether the district court's grant of respondents' motion for summary judgment before the prescribed time period had expired for the petitioner to serve an opposing affidavit was a "plain error" that the Court of Appeals was authorized to correct under Fed. R. Civ. P. Rule 6(a)(e) and E.D.LR 7.1(c).

II.

Whether the petitioner, a tenured college professor, timely complained under the Just Compensation Clause of the Fifth Amendment to the United States Constitution that the University of Michigan Regents had "taken" a portion of his property rights without just compensation.

III.

Whether absent a showing of "cause" it is against public policy for the University of Michigan Regents and their appointed agents to take a portion of the petitioner's property rights without compensation in contravention of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

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In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 10, 1998.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US CONST, AM V

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 42 USC - The Public Health and Welfare, Section 1983.

Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 USC section 2000e-5(e)(1)

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstance of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filled by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred.

MCL 600.5856 : MSA 27A.5856 Michigan's Tolling Statute

The statutes of limitations are tolled when, (1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when (2) jurisdiction over the defendant is otherwise acquired, or when, (3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter.

Fed. R. Civ. P. Rule 56

Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Fed. R. Civ. P. Rule 12

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. R. Rule 6 Time

(a) Computation. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Fed. R. Civ. P. Rule 6

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribe period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

LR 7.1 MOTION PRACTICE

(c) Response. A respondent opposing a motion shall file a response, including a brief and such supporting documents as are then available, within 10 days after service of the motion.

STATEMENT OF THE CASE

The JUST COMPENSATION CLAUSE of the FIFTH AMENDMENT to the UNITED STATES CONSTITUTION protects the citizenry from the government's unfair "taking" of property rights without a sufficient "cause" or just compensation. In 1791, the BILL of RIGHTS including the Fifth Amendment were attached to the U. S. Constitution. Subsequently, Congress enacted 42 U.S.C. Section 1983 as part of the Klu Klux Klan Civil Rights Act to enforce the Constitutional Amendments.

This Court's interpretations of the JUST COMPENSATION CLAUSE hold that a State is bound by the clause. See, *Ruckelshaus v Monsanto Co.*, 467 US 986 (1984); *Pruneyard Shopping Center v Robins*, 447 US 74, 84 (1980); *United States v General Motors Corp.*, 323 US 373, 377-78 (1945); *Chicago, B. & Q.R. Co. v Chicago*, 166 US 266 (1897).

The University of Michigan is a constitutional public educational corporation created by the Michigan Constitution(1963) under control of the University of Michigan Regents. The constitutional status of the University renders it as a fourth arm of state government, thus an instrumentality of the State of Michigan. See, *Ritter v Michigan*, 851 F2d 846 (6th Cir. 1988). The Regents are State officials clothed with the power of eminent domain. See, *People v Brooks*, 224 Mich 45 (1923).

Pursuant to, *Regents' Bylaw Chapter V, sec. 5.08(1)*, the Regents are responsible for the employment positions of tenured professors. (R 1 Complaint, Apx at p 8).

On May 16, 1975, the Regents offered the petitioner, for the purpose of inducing employment, a 12-month university appointment with tenure. (R 1 Complaint Exhibit C, Apx at p 21). The appointment included health insurance, a paid vacation and the university's contributions to the petitioner's retirement program.

The petitioner provided consideration for the appointment by sacrificing substantial bargained-for private practice income and the relinquishment of a substantial portion of his dental business for the appointment. See, *Heaman v E. N. Rowell Co. Inc.*, 258 NYS 138 (N.Y. 1932); Corbin, Arthur, "CONTRACTS" Section 137 (1963). (R 1 Complaint Exhibit B, Apx at p 20).

The understanding between the parties was that the petitioner would enjoy the protected property rights in the terms of his university appointment with tenure until retirement. See, *Beitzell v Jeffrey*, 643 F2d 870 (1st Cir. 1981); *Hennessey v National Collegiate Athletic Association*, 564 F2d 1136 (5th Cir. 1977); and Black's Law Dictionary, 6th edition pp 1469-70, West (1990).

The petitioner in good faith and fair dealing accepted the Regents offer and began the performance of his duties on September 1, 1975. (R 1 Complaint Exhibit D, Apx at p 22).

In 1972, in two landmark companion cases, this Court set out the distinctions between non-tenured and tenured professors. While non-tenured professors may have an expectation of continued employment, they have no entitlement and are subject to discharge for any reason or no reason. Tenured faculty members have an entitlement for a cognizable protected property right to continued employment described by the terms of their university appointment when tenure was conferred and have a cause of action when this

property right is invaded. See, *Board of Regents of State Colleges v Roth,* 408 US 564, 578 (1972); *Perry v Sindermann,* 408 US 593, 601 (1972).

On June 13, 1989, respondent Duderstadt sent the petitioner a business letter describing the terms and conditions of his university appointment with tenure. This letter reflects a 3-month reduction in employment and a 25 percent reduction in wages and benefits, effective July 1, 1989. (R 1 Complaint Exhibit E, Apx at p 23).

The respondents admit that July 1, 1989, is the date the disputed employment practice occurred. (R 1 Complaint, Apx at p 7). See, *Delaware State College v Ricks,* 449 US 250, 259 (1980); *Electrical Workers v Robbins & Myers,Inc.,* 429 US 229 (1976); *Cada v Baxter Healthcare Corporation,* 920 F2d 446,449 (7th Cir. 1990) citing Ricks, supra..

On August 2, 1989, the petitioner activated the university's grievance procedures. The grievance procedures ended in April, 1990, without a satisfactory resolution.

Since the 1990-91 fiscal year the respondents offer the petitioner a tenuous, at-will 1 year contract for two months of employment, wages and benefits.

LOWER COURT PROCEEDINGS

The petitioner invoked his due process rights by commencing an action in the U.S. District Court for the Eastern District of Michigan on July 20, 1990. On May 23, 1991, the complaint was dismissed. On July 18, 1991, the petitioner filed a complaint in the Michigan Court of Claims under the legal theories of inverse condemnation and breach of contract claims. The Court of Claims is a court of limited jurisdiction where the State of Michigan has given its permission to be sued for breach of contract. See, *Littsey v Board of Governors of Wayne State Un.*, 108 Mich App 406 (1981). The judge dismissed the complaint on September 23, 1992, on the basis that the petitioner did not have a formal contract signed by the University of Michigan Regents.

The petitioner timely appealed to the Michigan Court of Appeals, the Michigan Supreme Court and the United States Supreme Court. During the time period July 1, 1989, to the filing of this lawsuit on January 6, 1997, the petitioner was involved in litigation and appellate litigation for 2,264 days.

In his complaint, the petitioner asserted that equitable tolling was a bar to the affirmative defense, Statute of Limitations. (R 1 Complaint, Apx at p 12). See, *United States v Ibarra*, 502 US 1,4 (1991); *Zipes V Trans World Airlines Inc.*, 455 US 385 (1982);

Electrical Workers v Robbins & Myers, Inc., 429 US 299 (1976); *Miller v Runyon*, 77 F3d 189, 191 (7th Cir. 1996); *Darin v Haven*, 175 Mich App 144, 152 (1989); MCl 600.5856 : MSA 27A.5856.

On January 6, 1997, the petitioner filed a civil rights action, under the Just Compensation Clause of the Fifth Amendment to the United States Constitution, in the United States District Court for the Eastern District of Michigan. The petitioner alleged that the respondents had "taken" his property rights without just compensation. (R 1 Complaint, Apx at p 6). The respondents answered the complaint on January 28, 1997, with affirmative defenses and admitted to all the material facts in the case. (R 2 Answer, Apx at p 30).

On February 5, 1997, the petitioner filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. Rule 12(c). (R 4 Motion, Apx at p 50). On February 18, 1997, the district court noticed the petitioner's motion for a hearing on April 9, 1997. (R 7 Notice, Apx at p 117).

On February 11, 1997, the petitioner made a motion to strike the respondent's affirmative defenses. (R 5 Motion, Apx at p 52).

On February 21, 1997, the respondents made a motion for summary judgment on their affirmative defenses, statute of limitations and doctrine of res judicata under Fed. R. Civ. P. Rule 56(b). (R 10 Motion, Apx at p 57). On March 17, 1997, the district court noticed the respondents' motion for a hearing. (R 16 Notice, Apx at p 118).

On March 25, 1997, the petitioner (within the 13 day time limit) served an opposing affidavit with attachments on defense counsel and the district court. On March 28, 1997, the district court received the affidavit and attachments. (R 20 Affidavit, Apx at p 5).

On March 25, 1997, the district judge entered a judgment in the record granting the respondent's motion for summary judgment on their affirmative defense, statute of limitations. The judge dismissed the petitioner's action. (R 19 Judgment, Apx at p 48).

On March 31st the petitioner made a motion to vacate the judgment and order dated March 25, 1997. (R 21 Motion, Apx at p 59).

On April 9, 1997, the district judge denied the petitioner's motion. (R 22 Memorandum Opinion and Order, Apx at p 70).

On April 14, 1997, the petitioner appealed to the United States Sixth Circuit Court of Appeals. (R ____, Apx at p _____).

On February 10, 1998, the Sixth Circuit Court of Appeals affirmed the district court's decision. (R_____, Apx at p _____).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FAILED TO CORRECT THE "PLAIN ERROR" STAGED BY THE DISTRICT COURT AND RAISED BY THE PETITIONER ON APPEAL.

Plain error is defined as a deviation from a legal Rule during the district court proceedings. The error must be plain, clear or obvious. The error must affect substantial rights, which means the error must be prejudicial, affecting the outcome of the district court proceedings. See, *United States v Olano et al.,* 507 US 725 (1993).

Keeping this definition in mind and turning to the district court's record, it is found that the notice of hearing document dated February 18, 1997; pertinent part reads:

NOTICE OF HEARING

The following motion has been filed: Plaintiff L, Keith Yohn, D.D.S. motion for judgment on the pleadings, (filed February 7, 1997).

In accordance with Local Rule 7.1(c), the response to the motion shall be filed on or before March 4, 1997. (Emphasis in original).

DATED: FEBRUARY 18, 1997. (R 7 Notice, Apx at p 117).

The notice of hearing document dated March 17, 1997; pertinent part reads:

NOTICE OF HEARING

The following motion has been filed: Defendant Office of the General Counsel motion for summary judgment, (filed February 21, 1997).

DATED: MARCH 17, 1997. (R 16 Notice, Apx at p 118).

It is "clear" that a comparison of the two notice of hearing documents shows the district court informed the respondents that they had 10 working days from the date of service of the notice February 18, 1997 or until March 4, 1997 to respond to the petitioner's motion. The district court did not inform the petitioner of the number of working days or the date by which he must respond to the respondents' motion. This act by the district court shows partiality towards the respondents.

The notice of hearing documents submitted to the parties by the district court are computer generated. It requires a conscious human act to add or delete information from these documents.

It is "obvious" the district court wanton to deceive and trick the *pro se* petitioner into responding late to the respondents' motion, so the district court could dismiss the petitioner's action. This deception and partiality shown by the district court in favor of the respondents constitutes prejudice.

In accordance with E.D. LR 7.1(c) and Fed. R. Civ. P. 6(a)(e) the last day for the petitioner to respond to the respondents' motion would be 10 days add 3 days for mailing; equals 13 days.

It is "obvious" that if one starts counting on March 18th and counts for 13 days, excluding Saturdays and Sundays, one comes to April 3rd. The last day for the petitioner to respond to the respondents' motion for summary judgment was April 3, 1997.

The record "clearly" shows the petitioner served an opposing affidavit to defense counsel and the district court on March 25, 1997, and was received by the district court on March 28, 1997. (R 20 Affidavit, Apx at p 5).

The district court entered judgment against the petitioner and dismissed his action on March 25, 1997. (R 19 Judgment, Apx at p 48).

The district court opined the grounds for the dismissal was: "... plaintiff does not present an affidavit or any other evidence to refute defendants' claim ...." (R 18 Opinion and Order, Apx at p 46).

The act of the district court in entering judgment in the record and dismissing the petitioner's action before the prescribed time period for the petitioner to respond had expired is prejudicial to the petitioner and shows favoritism and partiality [prejudice] towards the respondents.

The "plain error" committed by the district court is prejudicial and substantially affects the petitioner's right to judgment on the pleadings and deprives him of his constitutional right to a trial [under the " Due Process of law " clause of the Fifth Amendment of the U.S. Constitution] on the issue of compensation for the "taking" of the petitioner's property rights.

This act by the district court vitiates the Local Rules of Civil Procedure E.D. 7.1(c) and Fed. R. Civ. P. 6(a)(e) and warrants reversal of the judgment which was not corrected by the Appeals Court. This action by the courts seriously affect the fairness, integrity and public confidence in the judicial proceedings and the courts.

II. THE COURT OF APPEALS AFFIRMANCE OF THE DISTRICT COURT'S DECISION THAT THIS CASE IS BARRED BY THE STATUTE OF LIMITATIONS CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER COURT OF APPEAL'S DECISIONS.

The United States Congress decided when the Statute of Limitations clock begins to tick in employment cases. Under 42 USC section 2000-5(e)(1) congress said, " the time limitation periods commence on the date the *alleged unlawful employment practice occurred."* See, *Delaware State College v Ricks,* 449 US 250, 259 (1980); *Electrical Workers v Robbins & Myers,Inc.,* 429 US 229 (1976).

And, "the statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks." See, *Cada v Baxter Healthcare Corporation,* 920 F2d 446,449 (7th Cir. 1990) citing Ricks, supra..

The Sixth Circuit Court of Appeals says that the statute of limitations clock begins to tick in this case when, "The limitations period began to run in 1988, when Yohn was notified of the University's decision to reorganize the School of Dentistry and to adjust his appointment accordingly. *Collyer v Darling,* 98 F3d 211, 220 (6th Cir. 1996), cert. denied, 117 SCt 2439 (1997);

Friedman v Estate of Presser, 929 F2d 1151,1159 (6th Cir. 1991)." (R _____, Apx at p _____).

The cases cited by the court of appeal's panel are distinguishable. The cases used for precedent by the panel are out of context, they do not involve an employer-employee relationship and do not state a 42 USC section 1983 uncompensated "taking" of property rights claim. In *Collyer,* supra. the court relied on *Seiver v Turner,* 742 F2d 262 (6th Cir. 1984). In *Seiver,* the plaintiff Seiver was a father who signed a consent order for child support without seeking advice of counsel. Five years later Seiver retained an attorney and filed a complaint against the defendants under 42 USC section 1983 for a violation of due process. The court ruled that the statute of limitations began to run when Seiver signed the court order in July, 1977, not in July, 1982, and that Seiver knew or should have known of his injury in 1977, and at that time he should have diligently sought the advice of counsel before signing the court order.

In *Friedman,* supra., the plaintiff Friedman was a union officer who sued other union officials claiming that other union officials had been acting as government informants and entrapped the officer into embezzling union funds. Again, the court relies on *Seiver,* supra. for precedent.

The use of *Seiver,* supra. by the Court of Appeals panel as precedent for their affirmance of the district court's decision in the present case is not good law.

III. THIS CASE PRESENTS A SUBSTANTIAL QUESTION INVOLVING FEDERAL CONSTITUTIONAL LAW IN THE CONTEXT OF THE UNIVERSITY COMMUNITY WHICH HAS NOT BEEN ANSWERED BY THIS COURT OR ANY OTHER COURT IN AMERICAN JURISPRUDENCE.

A university appointment with tenure is one of the most prestigious positions in the employment world. *Frye v Memphis State University,* 806 SW2d 170 (Tenn 1991).

It is one of a professor's most cherished possessions. Perhaps, it is as valuable as money, chattels and real estate. It is a property right. The right to possess property is the highest basic right known to man. It is the possession of this property right that sustains the professor in the every-day world and allows him to enjoy his chosen profession while he serves society in the profession of teaching and learning.

It is a property right that protects him from greed, envy, pretext, self-serving interest, arrogance, favoritism, religious, philosophical, political, sex, race, age or any other illegitimate reason(s) alleged by the powers above.

If the Regents can arbitrarily and capriciously take 25% of a professor's property rights without a "cause" or just compensation, then there will be nothing to prevent the Regents from taking 50%, 75% or 100% of his property rights. This will give the Regents a powerful weapon to force tenured professors out of their chosen profession; out of the protected property rights that are attached to their university appointments and to chip away at academic freedom and tenure, the cornerstone of teaching and learning.

The decision of the Court in this case will establish precedent which will affect millions of present day and future professors in this country's colleges and universities. The unfair "taking" of professors' property rights without sufficient "cause" or compensation needs to be rectified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

L. Keith Yohn, D.D.S.

Dated: March 2, 1998.

pro se

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed: February 10, 1998

RE: 97-1442

Yohn v University of Michigan Regents

District Court No. 97-70041

Accordingly, Yohn's Motion to Strike is denied, and the district court's order granting summary judgment in favor of the defendants is affirmed pursuant to Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

L. Keith Yohn, D.D.S.,

Plaintiff,

Civil Action No.
97-70041-DT

v

University of Michigan Regents,
et Al.,

Defendants.

Opinion and Order Granting Defendant's
Motion for Summary Judgment

Indeed, assuming arguendo that there is legal precedent to support tolling the statute, plaintiff does not present an affidavit or any other evidence to refute defendants' claim that there have been a total of four years and ten months during which there was no litigation on this matter. Thus, regardless of how the court counts the years, months and days, this action was filed beyond the three year statute of limitations and must be dismissed.

IT IS ORDERED that defendants' motion for summary judgment is granted.

Dated: March 25, 1997

John P Mayer, Clerk

Detroit, Michigan

APPENDIX B